Supreme Court, U. S.
FILED
JUL 14 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinions of the New York Court of Appeals, dated December 19, 1977, are set forth at page 2a of the Appendix to the Petition for a Writ of Certiorari (hereinafter "Cert."), and are reported at 43 NY2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756. The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department, dated December 17, 1976, is set forth at Cert. 21a and is reported at 55 AD2d 107, 389 N.Y.S.2d 719. The orders of trial court Judge DePasquale, dated November 4, 1976 and November 17, 1976, ejecting the public and press from a suppression hearing and denying access to the transcript thereof, are set forth in the Appendix (hereinafter "A.__") at pages A. 4 and A. 11, and are unreported.

JURISDICTION AND PARTIES

The judgment of the New York Court of Appeals was entered on December 19, 1977. A timely motion for reargument was denied on January 12, 1978. Certiorari was granted on May 1, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

Respondents are Hon. Daniel A. DePasquale, County Court Judge of Seneca County, New York; Kyle E. Greathouse; David R. Jones; and Stuart O. Miller, District Attorney of Seneca County, New York. Mr. Miller, at the time of the suppression hearing, was the Public Defender representing David R. Jones, but was thereafter elected District Attorney. He is substituted as a party pursuant to Rule 48 (3) of the Court.

QUESTIONS PRESENTED

1. May the public and press, consistently with the First, Sixth and Fourteenth Amendments to the United States Constitution, be ejected from a traditionally public pretrial suppression hearing when a trial judge believes that publication by the press of truthful statements concerning the hearing might threaten the right of a defendant to an impartial jury?

2. Does an order excluding the public and press from a pretrial suppression hearing, issued without notice, hearing or findings of fact, deprive the press and public of their First and Sixth Amendment rights without due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . "

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF THE CASE

Introduction

In mid-July, 1976, Wayne Clapp, a former police officer in a suburb of Rochester, New York disappeared while fishing on Seneca Lake. On July 21, 1976, Respondents Greathouse and Jones were arrested in Michigan and charged with Clapp's murder (A. 24). Following their extradition to New York, Mr. Greathouse and Mr. Jones ("defendants") were indicted for murder in Seneca County, New York (A. 23), approximately forty miles from Rochester. This case arises out of the criminal prosecution of the defendants in Seneca County Court, before Judge Daniel A. DePasquale.

Gannett Co., Inc. ("Gannett") is the publisher of two daily Rochester newspapers, the morning *Democrat & Chronicle* and the evening *Times-Union* (A. 21-22). Gannett reporters were assigned to observe and report on both the murder investigation and the post-arrest proceedings, which the District Attorney and defense attorneys had described as novel and complex because the corpse of the victim had never been found (A. 24).

The Proceedings in the Courts Below

On November 4, 1976, a suppression hearing in the criminal case was scheduled to take place before Judge DePasquale. Among those in the courtroom was Gannett news reporter Carol Ritter (A. 25). At the commencement of the hearing, the attorneys for the defendants moved to eject both the press and the public from the courtroom, asserting only that "we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial . . . " (A. 4). The prosecutor acquiesced in the request, and the court, with no inquiry into the basis for the attorneys' motion, quickly granted it, stating:

> ". . . these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions." (A. 5-6).

The courtroom was immediately cleared, and the hearing commenced.

No evidence was submitted in support of the closure motion. No further rationale for closure was given, and no countervailing interests were mentioned (A. 4-6).

While the hearing continued, Mrs. Ritter was able to secure the advice of legal counsel. On November 5, 1976, shortly before the hearing ended, she submitted a written request to Judge DePasquale seeking a postponement of the proceeding to allow argument against the ejection. She asserted that the press had a right to attend and that "all due consideration for a fair trial" would be given before publication (A. 7). The request was denied, and the hearing concluded on Friday afternoon, November 5 (A. 8).

On Monday morning, November 8, 1976, counsel for Gannett appeared before Judge DePasquale and moved to vacate *nunc pro tunc* the ejection order and to gain access to the stenographic transcript of the hearing, on the grounds that the order (1) had abridged First and Sixth Amendment rights of the public and press to attend and to disseminate news of the hearing, and (2) had been issued in a procedurally improper manner (Cert. 42a). Argument on the Gannett motion was scheduled for the following day.

On November 9, 1976, the prosecutor and defense attorneys challenged, on procedural grounds, Gannett's right to relief. Gannett was not permitted either to argue orally or to submit legal memoranda concerning the merits of its motion, which was adjourned indefinitely (A. 9-10). Three days later, Judge DePasquale informed the parties that he would permit arguments to be made on November 16, 1976 concerning the validity of the ejection (A. 26).

After argument, Judge DePasquale rejected the Gannett claim, declaring:

> "I do not believe that there are any authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press." (A. 14).

Although counsel for Gannett specifically asked Judge DePasquale to require a "factual showing" as to the necessity for ejection, and "to put on the record why there are no alternative remedies [to ejection] and how the defendants would be prejudiced [by a public hearing]" (A. 16), he did not do so. Judge DePasquale merely indicated that the basis for his order had been "a reasonable probability of prejudice" to the defendants (A. 14, 17). No factual showing of any kind was made.

On November 17, 1976, Judge DePasquale signed an order which denied Gannett's motion and sealed the transcript of the suppression hearing in perpetuity (A. 12). The following day, Gannett sought review of Judge DePasquale's orders in the Appellate Division of the Supreme Court (A. 19). For the first time, newspaper articles which had been published prior to the suppression hearing were offered, by Gannett, into evidence (A.

32-47). On December 17, 1976, that Court unanimously vacated Judge DePasquale's orders. The Court held that those orders transgressed the public's "vital interest in open judicial proceedings, especially criminal proceedings" (Cert. 23a), and constituted a prior restraint on publication in violation of the First Amendment (Cert. 25a).

Before the Appellate Division issued its decision, both defendants pleaded guilty to lesser crimes in satisfaction of the murder indictments pending against them (Cert. 5a).

On appeal, the New York Court of Appeals dismissed the case as technically moot. However, recognizing the importance of the matter, it retained jurisdiction and, voting 4-2, upheld the ejection of the public and press from the courtroom.

While recognizing that judicial proceedings are traditionally open to the public (Cert. 5a), the majority nevertheless declared:

> "... Knowing ... that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt ... we require the Trial Judge to ensure that tainted evidence never see the light of day ..." (Cert. 8a).
>
> "... The extent of the media's right to access should not remain unresolved, for it places in issue the very integrity of our courts."
>
> "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced .... At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." (Cert. 10a).
>
> "... To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest."
>
> • • • •

> "... Th[e] level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity. Here the public's concern was not focused on prosecutorial or judicial accountability; irregularities, if any, had occurred out of State." (Cert. 11a-12a).

The dissenters concluded that placing the burden upon the press to demonstrate "an overwhelming interest in keeping all proceedings open" (Cert. 11a) would close the court to the public and press in virtually every newsworthy case. The dissenters would permit the public and press to be barred only in cases of compelling necessity, where other means of preserving a fair trial had been proven ineffective:

> "... Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods ... would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment [citations omitted]." (Cert. 19a).

The Newspaper Articles

Before Judge DePasquale ejected the public and press from the courtroom, Gannett's Rochester newspapers printed a total of 15 articles concerning the Clapp investigation and prosecution (A. 32-47). The articles appeared in the morning *Democrat & Chronicle* and the evening *Times-Union*, and are essentially

duplicative. Thus, on July 20, 1976, both papers announced the disappearance of Clapp (A. 32-33); on July 22, both papers described the arrest of the defendants (A. 34-36); on July 23-24, the defendants' extradition to New York was reported (A. 37-40); and on July 25 the *Democrat & Chronicle* described their arraignment upon return (A. 41). On August 3, 1976 both papers printed the announcement of a memorial service for Clapp and a recitation of the indictment of defendants (A. 42-44), and on August 6, 1976, both papers reported the defendants' arraignment on the indictment (A. 45-47).

After August 6, no news report concerning the criminal case was published for 91 days, until November 5 — *after* Judge DePasquale closed the courtroom (A. 48).

The articles indicate that Wayne Clapp, a former policeman in Brighton, New York (a suburb of Rochester), disappeared while fishing in Seneca County (A. 32). At the time of the disappearance, police asked through the *Times-Union* for help in solving it (A. 24, 33). Two days later, the transient defendants were arrested in Michigan (A. 34). Police described their extradition to New York as presenting a "unique legal question" (A. 38). After defendants' return and indictment for murder, the prosecutor publicly asserted that the case would be the first homicide prosecution in New York State to proceed without the body of the victim (A. 43): Clapp's corpse has never been recovered. Similarly, the Public Defenders representing the defendants described the case as novel and complex (A. 45, 46).

The public interest in the Clapp murder case was typical of its concern with the investigation of any serious crime and the ability of our courts to protect the rights of the public and of the accused. The press coverage reflected that public interest. The news articles were factual and objective, and the press did not attempt to distort or sensationalize the matter.

SUMMARY OF ARGUMENT

Criminal trials and suppression hearings are the mechanisms by which the State formally deprives its individual citizens of their liberty. Criminal courts are thus unlike other public institutions. Their proceedings must be fair, and the community at large must know them to be fair. It is a fundamental tenet of our society that criminal proceedings are to be public events. Public scrutiny of the criminal process, implemented through personal attendance of the press and individual citizens, is simultaneously a safeguard to the criminal accused and the means by which the people are made aware of the enforcement of the criminal law.

The New York Court of Appeals denigrated all public interest in the criminal process as "mere curiosity," and characterized public scrutiny of pretrial hearings as a threat to fair trials. With the purpose of ensuring that testimony at suppression hearings "never sees the light of day," the Court authorized the summary ejection of the public and press from suppression hearings whenever the public, through "press commentary," manifests an interest in those proceedings. The Court of Appeals decision directly affronts basic rights of the public and press secured by the First and Sixth Amendments, and poses an ominous threat to the interests of criminal defendants as well.

Part I of this brief demonstrates that public awareness and press discussion of both criminal trials and suppression hearings lie at the heart of First Amendment objectives. The traditional attendance of the public and press in our courts has resulted in an ongoing flow of information crucial to a democratic society. Closure of courtrooms otherwise open to the public, with the specific intent of interdicting that information flow, is a devastating First Amendment injury and can be justified, if at all, only if those standards set forth in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) are satisfied. The record in this case

demonstrates that no danger to a fair trial existed; effective alternatives to restrictions on First Amendment rights were available to avoid the subjectively perceived danger; and closure orders are inherently incapable of safeguarding the right to a fair trial. The Court of Appeals' "standards," which hinge courtroom secrecy upon the existence of press commentary, and which place the burden upon the press of re-establishing its right to be present in the courtroom, are repugnant to cherished guarantees of free speech and press and give free rein to potentially serious abuses of the right to a fair trial.

In a closely related argument, Part II of the brief demonstrates that the basic values underlying society's need for open trials and the historical development of the Sixth Amendment establish a right of the public to public trials, wholly independent of the similar right secured to criminal defendants. No showing was made sufficient to overcome the public right in this case.

Part III of the brief shows that trial judges must be precluded from conducting secret trials and hearings unless they first afford to those whom they wish to eject adequate notice, an evidentiary hearing, and an opportunity to seek a stay from an appellate court.

ARGUMENT

I

EJECTION OF THE PUBLIC AND PRESS FROM THE SUPPRESSION HEARING VIOLATED THE FIRST AMENDMENT

The trial court ejected the public and press from a suppression hearing solely upon the unsupported request of defense counsel (A.4-6). The New York Court of Appeals sustained that ejection, and held that pretrial evidentiary hearings are presumptively to be closed in New York "[a]t the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue," and may be reopened only if the press can carry the burden of demonstrating a "legitimate public interest" or an "overwhelming interest in keeping all proceedings open." (Cert. 10-11a). Those holdings wholly disregard the requirements of the First Amendment.

A. *The First Amendment protects the flow of information to the public concerning judicial proceedings*

The First Amendment ensures that the public will be sufficiently informed to exercise competently its sovereignty over public institutions.

> "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Its central meaning is to preserve the right of free discussion of the stewardship of public officials (*New York Times Co. v. Sullivan*, 376 U.S. 254, 275 [1964]), which is "the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). *See also* 2 T. Cooley, *Constitutional Limitations* 885-86 (8th Ed. 1927). There is a "paramount public interest in a free flow of information to the people" concerning judges and judicial administration, an interest secured by the ability of the public and

press to attend trials and thereafter to disseminate reports concerning them. *Garrison v. Louisiana, supra,* 379 U.S. at 77.

The press plays a particularly important role with respect to judicial proceedings. It enlightens the public by "report[ing] fully and accurately the proceedings of government." It simultaneously performs the corrective function of "bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975). *See also, Maryland v. Baltimore Radio Show,* 338 U.S. 912, 920 (1950) (Frankfurter, J. Opinion on denial of cert.).

Press reports of judges and judicial proceedings are near the "core of the First Amendment" and "clearly serve [] those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." *Landmark Communications, Inc. v. Virginia,* 56 LEd 2d 1, 10-11 (1978). *See also* 1 Z. Chafee, *Government and Mass Communications* 432-33 (1947).

The interrelationship of the press with the criminal justice system is so close as to have been emphasized when tensions between robust reporting and the impartial administration of justice have been the greatest:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. . ." *Sheppard v. Maxwell,* 384 U.S. 333, 350 (1966).

Even when conduct of the press demonstrably prejudiced a criminal defendant's interests, this Court nevertheless indicated

"there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Id.* at 362-63. In short:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 587 (Brennan, J. concurring).

B. *The flow of information to the public concerning pretrial suppression hearings is vital to public understanding of the judicial system*

A pretrial suppression hearing is in many ways the most critical stage of the criminal process for the purposes of the First Amendment. First, the overwhelming majority of criminal prosecutions consist solely of "pretrial" proceedings followed by either dismissals or, as in this case, negotiated pleas of guilty to lesser charges. For example, in New York City during 1976, 89.7% (17,770) of all felony dispositions were made prior to trial, and in the remainder of New York State, 93.4% (5,676) of such dispositions in 1976 were so made. In Seneca County, New York (where this case originated), *100%* of all felony dispositions in 1976,[1] 1975[2] and the latter half of 1974[3] took place without trial.

[1]State of New York, *Twenty-Second Annual Report of the Judicial Conference* 52-55 (1977).

[2]State of New York, *Twenty-First Annual Report of the Judicial Conference* 55 (1976).

[3]State of New York, *Special Six-Month Report of the Judicial Conference* 33 (1975).

Informed public awareness of the criminal justice system thus depends almost entirely upon receipt of information concerning occurrences prior to the selection of a jury.

Moreover, suppression hearings specifically resolve clashes between improper police conduct and the fundamental guarantees of the Bill of Rights.[4] It is there that overreaching searches and electronic surveillances, coerced confessions, suggestive lineups and improper photographic arrays are exposed, and their impact upon defendants and society minimized. A suppression hearing is often the *only* stage in the criminal process in which sworn "testimony of police officers regarding police conduct which usually occurs more or less in private within an environment which the police themselves create and in which they reign . . ." is given. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969) (*en banc*). That testimony should not be given in secret.

The procedural purpose of suppression hearings is to determine whether police activity is sufficiently abhorrent to invoke the exclusionary rule, itself a topic of utmost public interest, misunderstanding and skepticism.[5] Ironically, secret suppression hearings may defeat not only the public interest, but the deterrent purpose of the exclusionary rule itself. As a practical matter, police officers are made aware of suppression of evidence not through written opinions of trial and appellate courts, but by

[4] A criminal defendant in New York, for example, is entitled to a suppression hearing only when affidavits are submitted which demonstrate an unlawful search and seizure, unlawful eavesdropping, involuntarily obtained confession, or tainted identification proceeding. N.Y. Crim. Pro. Law §§ 710.20, 710.60 (McKinney Supp. 1977-78).

[5] The public is familiar with, for example, *Miranda v. Arizona*, 384 U.S. 436 (1966), because it has become symbolic of the maxim that "the criminal goes free, if he must, but it is the law that sets him free" (*Mapp v. Ohio*, 367 U.S. 643, 659 [1961]), a doctrine "viewed with incomprehension by nonlawyers in this country and lawyers, judges and legal scholars the world over." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

personal attendance at suppression hearings or through contemporary news accounts of police conduct which has been deemed improper. Closure of hearings thus renders the educational impact upon police less efficient. *Cf. Bivens v. Six Unknown Fed. Narcotics Agents, supra*, 403 U.S. at 417 (Burger, C.J., dissenting).

Secret hearings also seriously undercut the potential for improvement of police practices. A secret proceeding which results in suppression of evidence can focus public scrutiny solely upon the decision of the judge. Abusive police practices which lead to suppression of evidence may remain unknown to the public and receive little, if any, public attention or corrective pressure. If a secret suppression hearing is followed by release of the accused, it will be easier for police to point to the judge as the "one who let the criminal go free" rather than to accept responsibility for their own misconduct.

A suppression hearing results in findings of fact and legal conclusions by a judge, ideally based upon evidence adduced before him, which may effectively determine the disposition of the entire criminal prosecution. The suppression hearing in the case at bar was typical in that regard. The case undoubtedly would have been dismissed had the defendants' confessions been suppressed, since there was no corpse (A. 43), and there were apparently no eyewitnesses to the crime.

Secret suppression hearings deprive the community of its right to be aware of the basis for critical dispositions in the criminal process rendered without the concurrence of a jury. If such hearings are routinely closed, the public will know only that defendants charged with serious crimes are being set free although they have admitted guilt. Without the opportunity to attend or read news accounts of suppression hearings, the public cannot be expected to understand or accept such results, and increased skepticism of the courts and criminal justice system will result.

The Court of Appeals clearly erred when it described the public interest in this case as "mere curiosity" (Cert. 11a) and held that to "allow public disclosure of potentially tainted evidence . . . is to involve the court itself in the illegality" (Cert. 10a). All of the issues raised by suppression hearings are of the most serious public concern. This case, in which police investigated the apparent murder of an ex-policeman, failed to recover a corpse, and yet prosecuted young, transient and indigent defendants in a small community with which they had no previous connection, is but an example. The public is made aware of those issues not through participation in scholarly debate or review of appellate court opinions, but by reading about them in newspapers and, on occasion, by attending suppression hearings.

The "press commentary" (Cert. 10a) condemned by the Court of Appeals "is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Wood v. Georgia*, 370 U.S. 375, 388 (1962).

C. *Ejection of the public and press from suppression hearings infringes upon First Amendment rights*

Criminal proceedings are the mechanisms by which the State formally restricts the liberty of its citizens. Their central function in society has led them to be fully open to the public and the press.[6]

[6]The Court of Appeals acknowledged that "criminal trials are presumptively open" as are suppression hearings, at least until "press commentary threatens" the impaneling of an impartial jury. Cert. 5a, 10a; *accord*, N.Y. Judiciary Law § 4 (McKinney 1968). Discussion of the history of public trials and suppression hearings appears at p. 35-41 *infra*. The First Amendment implications of courtroom closures are, however, not contingent upon a Sixth Amendment right of the public and press to attend judicial hearings. The First Amendment limits interference by the State, through ejection, with the information flow traditionally linking the judicial process with society.

Public attendance at trials and hearings contemplates the direct exercise of the right of the public to receive information and ideas concerning the criminal justice system. *See generally Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976). An order of ejection interferes with that right, as it does with the right of the press to continue to observe those public events. The right of the press to remain at trials and hearings is "logically antecedent and practically necessary to any effective exercise"[7] of its responsibility to report fully and accurately, and to focus public scrutiny upon, the criminal justice system. *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 491-92.

The traditional presence of the press and public at trials and hearings has resulted in an ongoing flow to society of information at the core of the First Amendment. The ejection of the public and press from the courtroom is not an "incidental burdening of the press" — the "consequential, but uncertain, burden on newsgathering" – postulated in the confidential news source cases. *Branzburg v. Hayes, supra*, 408 U.S. at 682, 690. Rather, it is an absolute barrier to an important news source, which directly results in a "significant constriction of the flow of news to the public." *Id.* at 693. Ejection from "courts [where] reporters . . . are always present if they wish to be" (*Estes v. Texas*, 381 U.S. 532, 541-42 [1965]) directly and inevitably

[7]Note, *The Right of the Press to Gather Information*, 71 Col. L.Rev. 838, 843 (1971). In *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972); *id.* at 709 (Powell, J., concurring); *id.* at 723 (Douglas, J., dissenting); *id.* at 727 (Stewart, J. dissenting), a right to gather information, of some dimension, was acknowledged, since "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681; D. Ivester, *The Constitutional Right to Know*, 4 Hast. Const. L.Q. 109, 120-43 (1977); *9 Writings of James Madison* 103 (G. Hunt Ed. 1910). The right to "gather" information may not mandate "a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 46 U.S.L.W. 4830 (June 26, 1978). It is, however, infringed by ejection, with the specific purpose of restricting publication, from a normally public suppression hearing.

"abridges expression that the First Amendment was meant to protect," and diminishes "public access to discussion, debate, and the dissemination of information and ideas" about public affairs. *First National Bank of Boston v. Bellotti*, 55 LEd2d 707, 717, 722 (1978). A challenge by the press and public to their ejection from criminal trials and hearings, therefore, does not involve an attempt to gain unprecedented "access" to places from which they are "regularly excluded,"[8] or to require "openness from the bureaucracy." P. Stewart, *Or of the Press*, 26 Hast. L.J. 631, 636 (1975). And it certainly does not present an assertion by the press or the public of the right to "propagandize . . . views . . . whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 48 (1966). This case is simply an attempt to preserve the flow of crucial information to the public.

This Court has on a number of occasions held that the ability to exercise First Amendment rights in a variety of public places is protected. The press and public have traditionally exercised First Amendment functions at trials and hearings. Their presence is compatible with, and indeed necessary to, the continued legitimacy of the process of judicial administration. Where publicly owned areas are "so historically associated with the exercise of First Amendment rights . . . access to them for purposes of exercising such rights cannot be denied absolutely." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 559 (1972). Exclusion from criminal trials and hearings, triggered by press commentary and aimed squarely at publication which lies at the heart of the First Amendment, must comply with First Amendment standards. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Brown v Louisiana*, 383 U.S. 131 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963); Note, *The Rights of the Public and the Press to*

[8]Such as grand juries, prisons, conferences of the Court, or meetings in executive session. *Branzburg v. Hayes, supra*, 408 U.S. at 684. *See also Saxbe v. Washington Post*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Houchins v. KQED, Inc., supra*, 46 U.S.L.W. at 4831-33.

Gather Information, 87 Harv. L.Rev. 1505, 1520-21 (1974).

Denials of access to locations in which First Amendment rights were to be exercised have been characterized by the Court as prior restraints; the "Constitution's protection is not limited to direct interference with fundamental rights . . . [The Court is] not free to disregard the practical realities." *Healy v. James*, 408 U.S. 169, 183 (1972). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 US. 546, 552-56 (1975). Here, because of "press commentary" and with the express purpose of ensuring that "tainted evidence never see the light of day" (Cert. 8a) through publication, the Court of Appeals has denied a continued presence at a location necessary to that commentary. The inevitable effect of such action is to attain its intended result — the stifling of all publication of the facts of suppression hearings. As indicated by the dissenters (Cert. 15a) and intermediate appellate court below (Cert. 25a-28a), closure of a courtroom under those circumstances constitutes a prior restraint. *See Bantam Books v. Sullivan*, 372 U.S. 58, 67-71 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936); *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977) (dictum); *United States v. Cianfrani*, 573 F.2d 835, 862 (3d Cir. 1978) (Gibbons, J., concurring); Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L.Rev. 1505, 1517 (1974); G. Fenner, *The Rights of The Press and the Closed Court Criminal Proceeding*, 57 Neb. L.Rev. 442, 460-75 (1978). *But see United States v. Cianfrani, supra*, 573 F.2d at 861; *Gannett Pacific Corporation v. Richardson*, ____Haw.____ (No. 6946, May 26, 1978); *Philadelphia Newspapers, Inc. v. Jerome*, ____Pa.____, 3 Med. L. Rptr. 2185 (April 28, 1978).

Exclusion of the press and public from a courtroom is simply an attempt to achieve the restriction of publication which the Court faced in *Nebraska Press*, without complying with the standards set forth in that case. The holding of *Nebraska Press* will indeed be empty if it may so readily be circumvented by an

unrestricted, albeit creative, interference with a traditionally public news source.

D. *Transcripts cannot substitute for public attendance at trials and hearings*

The Court of Appeals attempted to minimize First Amendment concerns by declaring that "any true public interest [in suppression hearings] could be fully satisfied" (Cert. 12a) by supplying the press with stenographic hearing transcripts. Passing for a moment the definition of "true" public interest,[9] that conclusion is erroneous, for there are no alternatives to attendance which can sustain the flow of information to the public.

First, the Court of Appeals completely ignored the crucial importance of time to the dissemination of news:

> "... [P]ublic interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist." *Bridges v. California*, 314 U.S. 252, 268 (1941).[10]

Delayed publication is likely to be overshadowed by events of the later day and "may be inadequate to emphasize the danger to

[9]This Court has doubted the wisdom of "committing ... to the conscience of judges" the determination of what are "issue[s] of 'general or public interest'" and what are not (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 [1974]), a principle especially relevant where, as here, judges may well be the subject of such interest and scrutiny.

[10]The Court of Appeals denied the legitimacy of the press as a stimulus to the public interest: "Widespread public awareness kindled by media saturation does not legitimize mere curiosity" (Cert. 11a).

public welfare of supposedly wrongful judicial conduct."[11] *Pennekamp v. Florida*, 328 U.S. 331, 346 (1946); *accord, Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 560; *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968); *Wood v. Georgia, supra*, 370 U.S. at 392-93; G. Fenner, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 Neb. L.Rev. 442, 453 (1978). "... [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

Because of the dynamics of the newspaper industry, postponement of publication in theory often means non-publication in practice. A. Friendly and R. Goldfarb, *Crime and Publicity* 195-205 (1967). Suppression hearings accentuate the problem. If, for example, suppression of damaging evidence is followed by a dismissal or acquittal, publishers may fear libel accusations and be reluctant to print any information, including a confession, which tends to imply guilt. *Id.* at 205. In a system of delayed publication, therefore, the public might never know that the exclusionary rule was resulting in dismissals of charges against the guilty, or that the police were coercing confessions from the innocent.

Beyond the injury caused by delay, substitution of transcripts for attendance is inherently inadequate and assures that the full range of information generated at suppression hearings will *never* become known.[12] Crucial tones, inflections, gestures,

[11]Delay in publication may, for example, foreclose a proceeding's potential impact upon elections. Petitioner does not claim that such was the purpose or effect of the orders below, but both County Court Judge and District Attorney are elective offices in New York. Moreover, delay in disclosing the suppression hearing events may retard public pressure to correct police practices, and render impossible public comprehension of either the decision of the court or the plea of guilty which may follow.

[12]At a minimum, the sufficiency of transcripts derives from the fidelity and accuracy of the stenographer, who in New York is appointed and removed at the pleasure of the County Court Judge, subject to Appellate Division approval. N.Y. Judiciary Law § 198 (McKinney Supp. 1977-78).

impatience or inattentiveness — all those qualities of direct observation *(Kleindienst v. Mandel,* 408 U.S. 753, 765 [1972]) which constitute the "atmosphere" of a proceeding — are most unlikely to be recorded by a stenographer. Yet they are a necessary part of the fact-finding process, and are essential to a true comprehension of the trial proceeding, for they may lie at the heart of a subversion of justice.

> "If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called 'news' is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of 'newsmakers.'" *Branzburg v. Hayes, supra,* 408 U.S. at 729 (Stewart, J., dissenting).

Practical difficulties also make stenographic transcripts inadequate to supplant attendance at trials and hearings. For example, if a suppression hearing results in disposition of the charge, a transcript may not be prepared unless an appeal is taken. Furthermore, ordering transcripts, especially lengthy transcripts, for studied perusal generally will entail payment of a fee which is certain to deter individual members of the public, and very often reporters as well, from seeking such information. The effort involved in gaining access to transcripts filed with a clerk, stenographer, or the court — an inconvenience to the press — will eliminate whole classes of the public from awareness of the proceeding.[13]

Transcripts are untimely, incomplete, "less likely to reach persons not deliberately seeking" the information which they contain and are thus wholly unsatisfactory as an alternative to

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[13] Criminal trials, especially in metropolitan areas, are frequently observed by senior citizens and others — "a casually assembled group from among the unemployed members of the community, who are impelled by a more than average impulse to be present." Radin, *The Right to a Public Trial,* 6 Temple L.Q. 381, 393 (1931). It is unlikely that those courtroom "watchers" would seek out transcripts to review.

personal attendance. *See Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93 (1977); *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at 771. The effect of their substitution for public proceedings would be to diminish seriously the timely flow of information to the public concerning issues of utmost public interest. *Cf. Nixon v. Warner Communications, Inc.,* 55 LEd 2d 570, 586-87 (1978).

E. *The standards of the court below will make secret judicial proceedings the rule, and public awareness the exception*

The dynamics of the trial process and the standards set forth by the Court of Appeals are such that closure orders, if permitted as a fair trial "remedy" of the first instance, will ever more frequently and commonly be utilized, and will result in the prevalence of secrecy at *all* stages of the criminal process.

Trial judges were sensitized to their affirmative responsibility to secure impartial juries in *Sheppard v. Maxwell, supra.* In response to *Sheppard,* orders restraining the press from publishing information in its possession were fashionable for a time. Since *Nebraska Press,* closure of proceedings has become a most attractive option to trial courts. That it, of all palliatives for pretrial publicity, is simultaneously the most injurious to First Amendment values is of little moment to trial participants, since interference with the flow of information to the public is obscured by more tangible concerns and influences.

For example, defendants, and especially well known or socially prominent defendants, are likely to seek closure not so much to enhance their right to a fair trial, but simply to avoid public scrutiny or notoriety. Defense attorneys may, even if not urged by their clients, frequently request an order of ejection to shield their clients from all publicity, to protect themselves against charges of inadequate representation and, should the request be denied, to create an issue for appeal. Prosecutors, as in this case (A. 5), are likely to consent to the motion simply to avoid a risk of reversal on the grounds of prejudicial publicity.

Judges, too, are averse to reversals on appeal; resisting the combined request of all parties for closure takes extraordinary self-confidence, and at best is unlikely (A. 17). E. Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 Neb. L.Rev. 1, 7 (1977).

Closure of the courtroom is especially attractive to trial judges for additional reasons. It is simple; there are no difficulties in drafting or administering an ejection order. It does not require sanctioning or inconveniencing parties or participants, and does not interfere with the smooth progress of a trial or hearing. It is quick, and does not delay congested court calendars. It is inexpensive. Finally, it is superficially attractive. A judge faced with the urgent, specific demands of litigants will be inclined to consider abstract public scrutiny and awareness of the criminal trial process as an ominous "harm," rather than a fundamental societal good. Trial courts naturally will attempt to mitigate that harm directly by purging its source and, with it, First Amendment freedoms.

F. *The burden of justifying its presence in the courtroom was improperly placed upon the press*

Orders ejecting the press and public from trials and hearings cannot be challenged successfully under the standards articulated by the Court of Appeals. Their attractiveness to trial judges is thereby further enhanced. Apart from the "significant financial disincentives, particularly on the smaller organs of the media" involved in commencing collateral proceedings (*Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 610 [Brennan, J. concurring]),[14] objection would be futile. "Presuming" closure in newsworthy cases, the Court of Appeals has placed the burden

[14] For example, there are 78 daily newspapers and 404 weekly newspapers in New York State alone. Editor and Publisher Co., Inc., *1977 International Yearbook* 21, 285-87 (1977).

upon the press of justifying its continued presence in the courtroom by demonstrating to the trial court an "overwhelming interest in keeping all proceedings open" (Cert. 11a). By assuming that public interest in criminal suppression hearings is not of itself "legitimate," the Court of Appeals created an insurmountable dilemma. The press, ignorant of the facts to be developed at the hearing (A. 16), is nevertheless charged with demonstrating an overwhelming public interest in those facts. That burden of proof, improperly allocated (*Estes v. Texas, supra*, 381 U.S. at 615 [Stewart J., dissenting]; *Speiser v. Randall*, 357 U.S. 513, 525-26 [1958]), is impossible to sustain, and "signal[s] the common, if not certain, locking of the courtroom door virtually whenever requested in pretrial hearings" (Cert. 17a).

G. *The standard established by the Court of Appeals chills protected speech*

Even if ejection is not effected, the press, aware that its commentary about a proceeding will trigger ejection, and fearful of that eventuality, will "feel some inhibition" at disseminating information about criminal investigations and hearings. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965). That "chilling effect" inflicts certain, albeit immeasurable, injury upon First Amendment interests. *See First National Bank of Boston v. Bellotti, supra*, 55 L Ed 2d at 723 n.21; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974).

Trial judges, capable of ejecting the press and public from courtrooms when press commentary "threatens" a proceeding, are thus capable of selecting and choosing material which is to be published by the press. That capability is bestowed by the First Amendment upon editors, not judges. *Id.* at 256-58.

The *threat* of closure is being used by judges to impose upon the press the very restrictive orders presented to the Court in *Nebraska Press;* by submitting to such restraints, the press is at

least able to learn what is happening in the public's courts.[15]

The Court of Appeals has permitted ejection of the press from pretrial proceedings as a "remedy" of first resort for undesirable publicity. Its rationale will permit similar ejection from other stages of the criminal process. Press commentary or vigorous public discussion may *always* be perceived as "threatening" to a defendant's right to a fair trial, or even to a fair retrial after possible reversal. If closure is more desirable than *voir dire*, change of venue, sequestration and continuances at the pretrial stage, it is more desirable than such alternatives at the trial stage. In sum, the warning of Professor Emerson is most apt:

> "A system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions. And any such exceptions must be clear-cut, precise, and readily controlled. Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule." T. Emerson, *The System of Freedom of Expression* 10 (1970).

See also A. Bickel, *The Morality of Consent* 83 (1975).

H. *Secret proceedings may take place, if at all, only if the requirements set forth in* Nebraska Press *are met*

The lesson of *Sheppard* and *Nebraska Press* is that a trial court, faced with pretrial publicity, can safeguard a defendant's fair trial right by the judicious use of remedial actions which do

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15 ". . . Westchester County Court has barred newsmen from reporting on the pretrial hearings of two men charged with the highly publicized shooting deaths last March of two . . . women. In an interview explaining his order, [the judge] called it a 'different wrinkle' on the decision by the State Court of Appeals * * * *He noted that although his order was based on the decision of the state's highest court, it did not go as far as to exclude newsmen from the courtroom . . . Newsmen covering the trial were admonished to only report names of witnesses but not their testimony, the 'nature of the pretrial proceedings' but not their 'substance'* [emphasis supplied.]" *New York Times*, Jan. 15, 1978, p. 1, col. 8.

not interfere with First Amendment rights. It is submitted that here, where a courtroom was closed in an effort to restrict "press commentary," protections afforded First Amendment interests by *Nebraska Press* should apply. Specifically, ejection of the press and public from trials and suppression hearings to mitigate publicity should be permitted to occur, if at all, only after an evidentiary hearing establishing that (1) publicity presents a clear and present danger to a fair trial; (2) ejection will effectively mitigate or avoid that prejudice; and (3) the prejudice cannot be cured by means less restrictive of the flow of information to the public. *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-65. The orders of Judge DePasquale and the judgment of the Court of Appeals satisfy none of those criteria.

1. There was no showing of a danger to a fair trial

Judge DePasquale required no factual showing and made no finding that pretrial publicity would have interfered with the right of defendants to a fair trial. The Court of Appeals followed suit when it sustained Judge DePasquale and instructed trial judges to avoid "any developments that would *threaten* to truncate a defendant's right to a fair trial," and to close pretrial evidentiary hearings when "press commentary . . . would *threaten* the impaneling of a constitutionally impartial jury in the county of venue [emphases supplied]" (Cert. 10a-11a). That holding sets no standard whatsoever, and ignores the principle that restrictions on First Amendment rights cannot be based upon "undifferentiated fear or apprehension." *Tinker v. Des Moines School Dist., supra*, 393 U.S. at 508. "Speculation cannot take over where the proofs fail." *In re Sawyer*, 360 U.S. 622, 628 (1959).

Even assuming that appropriate findings of fact had been made, however, a review of the record (*see Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-65; *Edwards v. South Carolina, supra*, 372 U.S. at 233; *Pennekamp v. Florida, supra*, 328 U.S. at 335) will demonstrate that the ejection orders were unjustifiable.

"Pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 554. Here, the publicity most certainly did not create a trial atmosphere remotely similar to those in *Estes v. Texas, supra; Sheppard v. Maxwell, supra; Irvin v. Dowd,* 366 U.S. 717 (1961) or *Rideau v. Louisiana,* 373 U.S. 723 (1963). It consisted solely of "straight news stories," not "invidious articles which would tend to arouse ill will and vindictiveness." *Beck v. Washington,* 369 U.S. 541, 556 (1962). The unbiased nature of the articles made "real differences in the potential for prejudice." *Murphy v. Florida,* 421 U.S. 794, 800 n. 4 (1975); *accord, United States ex rel. Darcy v. Handy,* 351 U.S. 454, 457 (1956); *United States v. Haldeman,* 559 F.2d 31, 61 (D.C. Cir. 1976), *cert. denied,* 97 S. Ct. 2641 (1977). The articles focused upon the investigation of the alleged murder of an ex-policeman, the first murder prosecution in New York State to proceed without a corpse (itself a fascinating concept), and extradition proceedings which were publicly described by authorities as presenting a "unique legal question" (A. 38, 43). The publications were not part of a continuing "crusade" by the press, but appeared contemporaneously with the major events in the developing investigation and prosecution to which they referred. Articles objectively describing the disappearance of the victim, the arrest, the extradition, arraignments, and indictment appeared on only *seven* days of the *eighteen* day period during which those events occurred. The articles then stopped, fully ninety-one days before the commencement of the suppression hearing. *See Stroble v. California,* 343 U.S. 181 (1952). There were no graphic descriptions of prior crimes, confessions, lie detector tests, plea negotiations or other prejudicial topics; nor was there any indication that such publication would occur in the future. In short, the record in this case reflects restrained professional reporting of a serious crime. To sustain courtroom

closure as a first recourse in this case would virtually ensure that the public will be informed about suppression hearings, or about criminal investigations, only at the unbridled discretion of local magistrates.

Nor was the publicity in this case "pervasive." The inference of prejudice from the fact of publication, made by the Court of Appeals, is refuted by the virtually insignificant circulation of the *Democrat & Chronicle* and *Times-Union* in the county of venue. Seneca County's population in 1976 was approximately 36,000. *New York Legislative Manual* 1292 (1975). Yet the daily Seneca County circulation of the *Democrat & Chronicle* at the time was only 1,022, and its Sunday circulation only 1,532; the daily circulation in Seneca County of the *Times-Union* (of which there is no Sunday edition) was 1. American Newspaper Markets, Inc., *Circulation 77/78* 522 (1977). It simply cannot be argued that those circulation figures constitute the type of pervasive publicity which could conceivably interfere with a fair trial. The statistics do, however, demonstrate the ominous threat posed by the reflexive closure of judicial proceedings permitted by the Court below.

2. Ejection orders cannot safeguard the right to a fair trial

The second aspect of the test which must be met before an ejection order may issue is a showing that such an edict will effectively achieve its purpose. Ejection orders, however, are much less likely to assure an impartial jury than were the restraints imposed, and deemed ineffective, in *Nebraska Press Assn. v. Stuart, supra,* 429 U.S. at 565-67.

The Court of Appeals, concerned with the "possible effects of feedback from the community upon the ultimate disposition" of a criminal trial (Cert. 17a), attempted to avoid that feedback by closing the courtroom to the public. There is no doubt that courtroom closure completely interdicts dissemination of ac-

curate information concerning the happenings of judicial proceedings. Yet it is wholly unable to prevent that type of publicity which is most threatening to a defendant's right to an impartial jury. While an ejected press and public cannot know the actual testimony adduced at suppression hearings, they are nevertheless free to speculate as to its content, thus perhaps generating rumors which "could well be more damaging than reasonably accurate news accounts." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 567. Closure orders cannot prevent editorials or inaccurate articles concerning the testimony adduced; they cannot eliminate repetition of previously published prejudicial material; they cannot preclude comment upon the character of the accused, or repetition and emphasis of the fact that a defendant confessed.[16] If the purpose of an ejection order is to lessen public antagonism toward a defendant, it will often be counterproductive, since in itself courtroom closure is exceptionally newsworthy and its coverage in the press may draw more, albeit uninformed, public attention to the suppression hearing than otherwise (see A. 48-51). Ejection of the press can only emphasize the fact that a confession was made or evidence seized, and thus "adversely influence the jury as to the enormity of the crime or unduly impress them as to the importance of the evidence." Note, *Public Trial In Criminal Cases,* 52 Mich. L. Rev. 128, 134 (1953). Finally, the thrust of such orders is to encourage press dissemination of potentially unreliable information, directly contrary to the suggestion of the Court that trial judges should encourage "reporting the case as it unfold[s] in the courtroom — not pieced together from extrajudicial statements." *Sheppard v. Maxwell, supra,* 384 U.S. at 362. Ejection orders are

16 For example, an article entitled "Newsmen Barred at Court Hearing on Scarsdale Death" stated: "At issue in the current hearings is whether statements alleged to have been made by [the defendant], statements that the judge said 'could be characterized as confessions,' will be allowed when the trial starts next week. There are reportedly four separate instances in which the defendant is alleged to have confessed to the killing. . . ." *New York Times,* May 9, 1978, p. 36, col. 1.

therefore inherently ineffective to "prevent the threatened danger." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 562.

3. Remedial measures alternative to ejection of the press and public would clearly have sufficed

This Court has held repeatedly that:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

When a defendant's right to a fair trial has conflicted with the exercise of press freedoms, the Court has applied the "least restrictive means" test and articulated a number of specific measures which do not restrict the flow of information to the public, yet which are "sufficient to guarantee . . . a fair trial." *Sheppard v. Maxwell, supra,* 384 U.S. at 358; *accord, Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563-64, 569; *id.* at 604 (Brennan, J., concurring). This Court has not sanctioned ejection of the public and press from judicial proceedings in even the most egregious situations, since it has "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the courtroom is public property' . . . " *Sheppard v. Maxwell, supra,* 384 U.S. at 350.

Similarly, independent study groups have either refrained from endorsing secret pretrial proceedings (Report of the Judicial Conference Committee on the Operation of the Jury System, *"Free Press-Fair Trial" Issue,* 45 F.R.D. 391, 403 [1968]) or have directly recommended against it (Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* 10 [1976]; *Report of the Departmental Committee on Proceedings Before Examining Justices,* Cmnd. 479 [1957] at 9, 19).

An American Bar Association study authorizing limited closure, relied upon by the Court of Appeals (Cert. 10a), has been

drastically modified since the decision in *Nebraska Press*, and now successfully accommodates the rights of the press and public with those of a defendant. It authorizes ejection *only* if (1) a clear and present danger to the fairness of a trial would result from dissemination of information from the pretrial proceeding, *and* (2) the prejudice cannot be avoided by alternative means.[17] *ABA Criminal Justice Standards* § 8-3.2 (Tentative Draft 1978); *accord*, Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Free Press-Fair Trial* 21 (Comm. Print 1976); *Gannett Pacific Corporation v. Richardson*, ____ Haw. ____ (No. 6946, May 26, 1978); *Keene Publishing Corp. v. Keene District Court*, ____N.H.____, 380 A.2d 261 (1977); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E. 2d 127 (1976).

The Court of Appeals, however, ignored the decisions of this Court and all interests in open trials when it authorized ejection as a "remedy" of the first instance, speculating that "[c]ontinuance, extensive *voir dire* examinations, limiting instructions or venue changes *may* prove paltry protection for precious rights

17". . . [P]retrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of a jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a . . . pretrial proceeding . . . only if: (i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means." The commentary to the standard lists possible alternatives as: "(1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive *voir dire*, (6) additional peremptory challenges, (7) sequestration, and (8) admonitory instructions to the jury [footnote omitted]."

[emphasis supplied]" (Cert. 10a). The record here demonstrates the emptiness of that declaration.

Ejection in this case was unnecessary since, as in most criminal cases (*see* Notes 1-3 *supra*), no trial took place. Courtroom closures are, moreover, of themselves overbroad since they sweep clearly non-prejudicial matters within their scope. Very frequently, then, First Amendment values will be injured by closures, with no corresponding benefit to a defendant. *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 600-601 (Brennan, J., concurring).

In addition, the press in this case had certainly shown a great deal of sensitivity to the rights of the defendants. While the press has a right, and on occasion the obligation, to be abrasive and provocative, the record in this case emphasizes that press awareness of the needs of the criminal justice system is often significant.[18] *See id.* at 612-613 (Brennan, J., concurring).

Alternatives to restrictions upon First Amendment interests would clearly have avoided any injury to a fair trial in this case. For example, *voir dire* would undoubtedly have been effective. The limited circulation of the Gannett newspapers in Seneca County, together with its large population (p. 29 *supra*), certainly left a "substantial pool" of impartial persons from which a satisfactory jury could have been selected. *See Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 563 n.7.

Similarly, a change of venue, though rejected by the Court of Appeals, would unquestionably have avoided any effects of

18Specific indications of that awareness appear in the article concerning the ejection (which refers to the subject of the suppression hearing not as "confessions" but as "material to be discussed in testimony [which] might be eventually declared inadmissible as evidence when the case goes to trial" [A. 48]), and in the attempt to gain access to the hearing, which specifically acknowledged awareness of the defendant's right to a "fair trial" (A. 7). Voluntary standards reflecting sensitivity to defendants' needs have also been adopted. New York Fair Trial Free Press Conference, *Principles and Guidelines; Rules of Procedure* (1976).

publicity. The population of the counties contiguous to Seneca County is 349,324 and that of the Judicial Department in which Seneca County is located is approximately 3,915,343. *N.Y. Legislative Manual* 1292-93 (1975). Dense population centers were also nearby: Rochester and Syracuse are both approximately 40 miles distant, and Buffalo, New York is approximately 100 miles away.

Restricting the power of trial judges to conduct secret hearings may require creativity and insight on their part, but an accommodation between the interests of a defendant and the press will do more than preserve the right to a fair trial and the right to a free flow to society of critical information. It will avoid the creation of an antagonistic relationship among the press, defendants and the courts, and permit the press to fulfill its ultimate responsibility as the "handmaiden of judicial administration."

II

EJECTION OF THE PUBLIC AND PRESS FROM THE SUPPRESSION HEARING VIOLATED THE SIXTH AMENDMENT RIGHT OF THE PUBLIC TO A PUBLIC TRIAL

The Sixth Amendment guarantees, by its literal terms, the right of a public trial to the "accused."[19] To be sure, a public trial is a very significant right of a criminal defendant, and is derived from a fear that secret proceedings may result in "ruthless disregard of the right . . . to a fair trial." *In re Oliver*, 333 U.S. 257, 270 (1948). Yet the rule against secrecy is equally a right of society at large, for the benefits of public suppression hearings and trials extend far beyond the specific interests of a criminal defendant.

[19]The Due Process Clause of the Fourteenth Amendment guarantees a public trial in state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

> "The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake. . . ." *Lewis* v. *Peyton*, 352 F.2d 791, 792 (4th Cir. 1965).

The Court of Appeals, paying lip service to the need for a "sensitive and wise balancing of the rights of the individual defendant and the interests of the public" (Cert. 7a), nevertheless held that the public's interest in this case was not "legitimate," and authorized a secret proceeding. Petitioner submits that the lower court's holding is impermissible under the Sixth Amendment.

A. *There is a Sixth Amendment right of the public to a public trial*

The public trial provision "is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice' [citation omitted]." *Levine v. United States*, 362 U.S. 610, 616 (1960). That trials were uniformly open to the public at common law is clear,[20] and there is no evidence that the Constitutional Framers, who exhibited a "trend toward popular, non-technical administration of justice" (F. Heller, *The Sixth Amendment* 17 [1951]), and "a genius for studied imprecision" (L. Levy, *Legacy of Suppression* 308 [1960]), intended to limit the right to criminal defendants. Indeed, it is doubtful that at common law the right was ever meant to benefit the accused at all. M. Radin, *The Right to a Public Trial*, 6 Temple L.Q. 381 (1931); *Unites States v. Cianfrani, supra*, 573 F.2d at 853 n.6.

[20]*Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (Ct. App. 1956); *Matter of United Press Assns. v. Valente*, 308 N.Y. 71, 89-93, 123 N.E.2d 777 (1954) (Froessel, J., dissenting); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1965), *app. dism. as moot*, 164 Ohio St. 261, 130 N.E.2d 701 (Ohio 1955); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U.L.Rev. 1138 (1966); Note, *Public Trial in Criminal Cases*, 52 Mich. L.Rev. 128 (1953).

Colonial documents which addressed the concept did not confine its application to defendants. For example, Chapter XXIII of the Charter of Fundamental Laws of 1676 of West Jersey indicated:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner nor in any covert manner* ... [emphasis supplied]." 5 F. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America* 2551 (1909).

The Frame of Government of Pennsylvania similarly declared in 1682 that "all courts shall be open, and justice shall neither be sold, denied nor delayed." *Id.* at 3060.

The Constitutional phrase which guarantees a public trial to "the accused" reflects a concern for the rights of the individual, and an understanding that the interests of a defendant in a fair trial and those of the public in a public trial will generally coincide. They generally do. Yet, this case presents a situation where they may not, and the literal terminology of the Public Trial provision must be evaluated in light of its history and the purposes served by open judicial proceedings.

Publicity of judicial proceedings helps to insure that testimony will be of the highest attainable quality. The presence of an audience, especially at evidentiary hearings when no jury is present, minimizes perjury by stimulating an instinctive disinclination to falsify and a fear of contradiction. Moreover, witnesses previously unknown to parties may hear of a proceeding and come forward to offer important testimony. *In re Oliver, supra,* 333 U.S. at 270; *Tanksley v. United States,* 145 F.2d 58 (9th Cir. 1944); 3 Wigmore, *Evidence* §1834 (Chadbourn Rev. 1976).

Public proceedings stimulate attorneys to perform in a manner closer to the ideal. Public scrutiny has been hailed as ensuring that the work of even the court stenographer is "correct ... in every respect (completeness included)." 6 J. Bentham, *The Rationale of Evidence* 355 (Bowring Ed. 1843). Public scrutiny also serves as "an effective restraint upon possible abuse of judicial power" (*In re Oliver, supra,* 333 U.S. at 270), for:

> "Upon [the judge's] moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties it acts as a spur.... Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial....
>
> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks — as cloaks in reality, as checks only in appearance [footnote omitted]." 6 J. Bentham, *The Rationale of Evidence* 355 (Bowring Ed. 1843).

In the same fashion, judges who render unpopular or controversial (but proper) decisions based upon public testimony will be spared that skepticism and calumny which might accrue had their rulings emanated from secret hearings. "[O]ne of the potent means for assuring judges their independence is a free press." *Pennekamp v. Florida, supra,* 328 U.S. at 355 (Frankfurter, J., concurring).

Non-participants have a direct interest in the functioning of the criminal justice system and must be made aware of its administration. The victims of crimes, their families and acquaintances clearly are intimately interested in the outcome of a criminal prosecution. The community directly involved with the perpetrator and with the crime itself is interested as well. Awareness that criminal violations are formally being in-

vestigated and prosecuted encourages resort to the police and courts, reduces tension and lessens impulses toward private retribution. And, as in this case, police investigations often draw upon community knowledge through newspaper appeals for assistance (A. 33).

The community at large, the "final judge of the proper conduct of public business" (*Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 495), also has the need contemporaneously to monitor the performance of its public officials, including judges, prosecutors, police, and public defenders — all of whom are paid with public funds and act upon the lives of its individual members with the full authority of the State. Society's interest includes a general concern that its criminal laws are enforced impartially. Yet more specific concerns abound, and many were directly raised in this case. Do coerced confessions, unreasonable searches, calendar pressures, corruption or incompetence result in improper arrests, lead to the reduction and dismissal of charges against the guilty, or cause the unjust conviction of those who are indeed innocent? Only through continued observation of the courts can such questions be answered. As this Court has stated:

> "The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public." *Wood v. Georgia, supra,* 370 U.S. at 391.

In addition, fully open trials and hearings enhance a principal underlying purpose of the criminal law: the "general deterrent" effect. Timely newspaper reports of criminal prosecutions are a particularly important means of educating the public as to the bounds of socially acceptable behavior.

> "[Today a] considerable portion of what we call 'news' is devoted to reports about deviant behavior and its consequences. . . . [Newspaper accounts] constitute one of our main sources of information about the normative outlines of society." K. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* 12 (1966).

Full public awareness of the criminal process also serves, in a positive way, to reaffirm the moral values and conduct of "upright people." R. Hood and R. Sparks, *Key Issues in Criminology* 172-75 (1970).

Open court proceedings educate society by enabling people to understand and accept the decisions of judges which affect the quality and direction of their lives. "Conducting trials behind closed doors might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes." *United States v. Lopez,* 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971). In particular, closed hearings present an appearance of collusion which can quickly generate misgivings as to the court's activities:

> "Secret hearings — though they be scrupulously fair in reality — are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Cianfrani, supra,* 573 F.2d at 851.

Accord, Note, *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 169-70 (1976); *cf. Buckley v. Valeo,* 424 U.S. 1, 67 (1976).

The very legitimacy of our judicial system depends upon the public's ability to accept and understand it.[21] The Court recognized the importance of open proceedings when it observed that:

> "we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal

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[21] "Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy . . ." 3 Wigmore, *Evidence* § 1834 (Chadbourn Rev. 1976).

> trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute." *In re Oliver, supra,* 333 U.S. at 266.

That trials must be public was emphatically declared in *Craig v. Harney,* 331 U.S. 367, 374 (1947):

> "A trial is a public event. What transpires in the courtroom is public property . . . [t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

The public trial requirement applies as forcefully to suppression hearings as it does to proceedings following the selection of a jury. Beyond those issues developed heretofore (p. 13 *supra*), suppression hearings have traditionally been part of the trial and are held at the pretrial stage essentially for the convenience of the parties. *Compare Pinto v. Pierce,* 389 U.S. 31, 32 (1967) *with Jackson v. Denno,* 378 U.S. 368 (1964) *and Stein v. New York,* 346 U.S. 156, 172 (1953). A suppression hearing has all the "characteristics of a testimonial hearing, which is the essence of a trial proceeding" (*United States ex rel. Bennett v. Rundle, supra,* 419 F.2d at 605), and falls within the scope of the Public Trial clause:

> ". . . the witnesses were sworn, and they were subject to cross-examination. . . . There was pressure on the government to justify the procedures it used to obtain [evidence] and defeat the suppression motion. And there was pressure on the defendant to obtain suppression of the evidence. Credibility was in issue. The outcome rested upon factual determinations by the trial judge. Except for the necessary absence of the jury and some relaxation in the applicable rules of evidence, the . . . suppression hearing was in form the equivalent of a full trial.
>
> "As such, only by bringing the hearing within the ambit of the public trial provision can the important policies underlying that provision be served." *United States v. Cianfrani, supra,* 573 F.2d at 850.

Accord, United States v. Clark, 475 F.2d 240, 246-47 (2d Cir. 1973); *United States v. Sorrentino,* 175 F.2d 721 (3d Cir.), *cert. denied,* 338 U.S. 868, *reh. denied,* 338 U.S. 896 (1949); *United States v. Lopez, supra,* 328 F. Supp. at 1087; *United States v. American Radiator and Standard San. Corp.,* 274 F. Supp. 790, 794 (W.D.Pa.), *aff'd,* 388 F.2d 201 (3d Cir. 1967), *cert. denied,* 390 U.S. 922 (1968); *cf. Kirby v. Illinois,* 406 U.S. 682, 689-90 (1972).

B. *Parties may not agree to a secret proceeding and thereby defeat the right of the public to a public trial*

"It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding." *Houchins v. KQED, Inc., supra,* 46 U.S.L.W. at 4839 (Stevens, J., dissenting). Unnecessary closure of trials and hearings to the public will seriously jeopardize both their fairness and the public's confidence in them. It has, accordingly, long been established that the right of the public to a public trial is independent of, and may indeed outweigh, the particular advantages which might accrue to a criminal defendant from secrecy.[22]

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[22]References in *Estes v. Texas, supra,* 381 U.S. at 538; *id.,* at 583 (Warren, C.J., concurring); *id.* at 588-89 (Harlan, J., concurring) are not to the contrary. In *Estes,* intrusion of television broadcast equipment into a public trial so disrupted the proceeding as to deprive the defendant of due process of law. There was no suggestion that a trial may be *closed* to other than such internally disruptive forces. Indeed, the Court directly intimated the contrary:

> "It is true that the public has the right to be informed as to what occurs in its courts, but reporters . . . are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." *Id.* at 541-42.
>
> "So long as the . . . media [are] free to send representatives to trials and to report on those trials . . . there is no abridgment of freedom of the press." *Id.* at 858 (Warren, C.J., concurring).
>
> "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern." *Id.* at 614-15 (Stewart, J., dissenting).

In *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884), Mr. Justice Holmes, quoting from an earlier case, stated:

> "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

See United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949).

The independent right of the public to public trials and suppression hearings is equally as significant as that of a defendant.[23] Any attempt to conduct a secret proceeding must account

[23] *See Phoenix Newspapers Incorporated v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Commercial Printing v. Lee*, 533 S.W.2d 270 (Ark. 1977); *Kirstowsky v. Superior Court, supra; Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968); *State ex rel. Gore Newspaper Company v. Tyson*, 313 So.2d 777 (Fla. App. 4th Dist. 1975), *rev'd on other grnds. English v. McCrary*, 348 So.2d 293 (Fla. 1977); *Gannett Pacific Corporation v. Richardson, supra; Williamson v. Lacy*, 86 Me. 80, 29 A. 943 (1893); *State v. Copp*, 15 N.H. 212, 215 (1844); *State v. Allen, supra*, 73 N.J. at 157-68, 373 A.2d at 389-95 (Pashman, J., concurring); *Lyles v. State*, 330 P.2d 734 (Ct. Cr. App. Okla. 1958); *People v. Hinton*, 31 NY2d 71, 75, 334 N.Y.S.2d 885, 286 N.E.2d 265 (1972), *cert. denied*, 410 U.S. 911 (1973); *Oliver v. Postel*, 30 NY2d 171, 331 N.Y.S.2d 207 (1972); *State ex rel. Dayton Newspapers, Inc. v. Phillips, supra; E. W. Scripps Co. v. Fulton, supra; United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975); *United States v. Sorrentino, supra; U.S. v. Lopez, supra; United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199, 204 (D.N.J. 1971); *United States v. American Radiator and Standard San. Corp., supra; cf. Azbill v. Fisher*, 84 Nev. 414, 442 P.2d 916 (1968); *State ex rel. Newspapers, Inc. v. Circuit Court*, 65 Wis.2d 66, 221 N.W.2d 894 (1974). *But see State v. Allen, supra*, 73 N.J. at 169-78, 373 A.2d at 395-400 (Schreiber, J., concurring).

for the public right. For example, a defendant alone cannot, without more, insist upon a secret proceeding:

> "[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial ..." *Singer v. United States*, 380 U.S. 24, 35 (1965) (dictum).

Cf. Levine v. United States, supra, 362 U.S. at 616-17. *But see United States v. Sorrentino, supra*, 175 F.2d at 723. Nor, perforce, can judges and lawyers simply agree among themselves to conduct a secret proceeding, since an essential purpose of a public trial is to scrutinize judges and lawyers to insure that they are properly performing their duties. "Justice cannot survive behind walls of silence." *Sheppard v. Maxwell, supra*, 384 U.S. at 349; *cf. Nebraska Press Assn. v. Stuart*, 427 U.S. 1327, 1333 (1975) (Blackmun, J., Opinion on Reapplication for Stay); 6 J. Bentham, *The Rationale of Evidence* 371 (Bowring ed. 1843).

Portions of trials and hearings have, on occasion and for reasons unrelated to a defendant's right to a fair trial, been held *in camera*. For example, if there is an evidentiary showing that a witness' life would be directly endangered by exposure of his identity, secrecy may be appropriate. *See, e.g., People v. Hinton, supra*, 31 NY2d 71. Those occasions, however, differ greatly from this case, in which the Court of Appeals has permitted defeat of the public interest in a public trial precisely because the public, through "press commentary," manifests that interest. The Constitution requires a much stricter standard. Secret trials and suppression hearings may be had, even if agreed to by all parties, only upon a showing of "strict and inescapable necessity." *United States v. Cianfrani, supra*, 573 F.2d at 854; *accord, United States ex rel. Lloyd v. Vincent, supra*, 520 F.2d at 1274; *United States ex rel. Bennett v. Rundle, supra*, 419 F.2d at 607; Cert. 17a; Cert. 23a-24a.

In situations where the motivating force for closure is a concern over pretrial publicity, First Amendment and Sixth Amendment values overlap. The "strict and inescapable necessity" standard then requires, before suppression hearings and trials may be closed to the public and press, proof that a threat to a fair trial actually exists, that closure will defeat the threat, and that alternatives to secrecy are ineffective. As demonstrated previously (p. 26 *supra*), none of those criteria was met in this case. The ejection orders of Judge DePasquale and the judgment of the Court of Appeals thus violate the Sixth Amendment.

III

ORDERS EJECTING THE PRESS AND PUBLIC FROM JUDICIAL PROCEEDINGS MAY PROPERLY ISSUE ONLY AFTER NOTICE, A HEARING, AND STAY PENDING AN OPPORTUNITY TO SEEK A FURTHER STAY FROM AN APPELLATE COURT

Judge DePasquale ordered the public and press ejected from the courtroom without advance notice and without any evidentiary justification. The hearing concluded before attorneys were permitted to be heard in opposition to the order. The Court of Appeals indicated that such summary exclusion was improper, but did not articulate procedural standards sufficient to guide trial courts in the future (Cert. 11a).

Due process of law precludes such orders from issuing without reasonable notice, an evidentiary hearing, and, unless compelling reasons preclude it, a brief stay pending an opportunity to seek a further stay from an appellate court.

Due process is not a technical notion unrelated to practical circumstances, but calls for such procedural protections as the particular situation may demand. A proper analysis requires an evaluation of the private interests affected, the risk of erroneous deprivation of those rights from inadequate procedures, and the

governmental interest in avoiding additional procedural limitations. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In this case, the First and Sixth Amendment rights of the press and public were irreparably injured: the courtroom was closed and the hearing concluded before any argument could be made in opposition to the ejection order. The countervailing interest in the *procedural* manner in which ejection orders are issued, however, is the state interest in expeditious resolution of criminal charges. A brief delay in a criminal proceeding to afford the public and press an opportunity to be heard in opposition to an ejection order would adversely affect neither that interest of the State, nor the substantive interests of a defendant to a fair and speedy trial.

As this Court stated in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972):

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' .... It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' ... [citations omitted]."

In ejection situations, notice must be given to the press and public "at a time when the deprivation can still be prevented" (*id.* at 81), and in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ... [or] where conditions do not reasonably permit such notice, [in a manner] not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). If courtroom closure is contemplated because of potentially adverse publicity, notice should properly be given to those media organizations whose publications serve

as the basis for the closure request, and at a time which would permit them to be heard in opposition.

Due process may also require an evidentiary hearing, "depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). When closure of the courtroom to the press and public is contemplated, an evidentiary hearing, adversary in nature, with adequate findings of fact (*Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-64), is required to ensure the proper accommodation of the fundamental interests involved, both at the trial and appellate levels. As the Court indicated in *Carroll v. Princess Anne, supra*, 393 U.S. at 183:

> "The facts ... are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise [footnote omitted]. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication [footnote omitted]."

Finally, due process requires a brief delay in the implementation of ejection orders to afford those adversely affected an opportunity to seek a further stay from an appellate court. Since suppression hearings are typically of short duration, a failure to grant a stay is tantamount to denying the excluded party all relief.

> "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards [citation omitted], including immediate appellate review [citation omitted]. Absent such review, the State must instead allow a stay."

National Socialist Party v. Skokie, 432 U.S. 43, 44 (1977); *accord*, Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2nd Sess., *Free Press-Fair Trial* 21

(Comm. Print 1976); Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* 18 (1976).

The injuries suffered by the public and press when secret hearings take place are irreparable, and there is a dangerous potential of such injuries occurring to parties unable to seek vindication. Before the press or public may be excluded from a courtroom, therefore, reasonable notice to those affected must be given; an evidentiary hearing must be held; and an appropriate stay allowed.

CONCLUSION

The New York Court of Appeals perceived "press commentary" concerning pretrial hearings to be a threat to a fair trial. To eliminate that "threat," it has authorized reflexive closure of courtrooms to the press and public. Yet "in the very exercise of the function that provokes the fair trial problem, the press is at the same time serving as the community's most effective instrument for detecting and exposing ... other, more serious enemies of fair trial" (A. Friendly and R. Goldfarb, *Crime and Publicity* 239 [1967]), and secret proceedings themselves pose "inherent dangers to freedom." *In re Oliver, supra*, 333 U.S. at 273. The judgment of the Court of Appeals violates the First, Sixth and Fourteenth Amendments, and should be reversed.

Respectfully submitted,

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Dated: Rochester, New York
July, 1978